Supreme Court of the United States

October Term, 1960

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Roy J. Keeler,
Hall, Long & Metzger,
208 Walnut Street,
Harrisburg, Pa.
Counsel for Appellant

TABLE OF CONTENTS

	Page
A. Opinions Below	2
B. Jurisdiction	2
C. Questions Presented	5
D. Statement of the Case	5
(1) The Statute; Nature of tax; and Tax Formula	5
(2) History of the Case	7
(a) The Operating Agreement	8
(b) Car Service and Per Diem Agreement	10
(3) How The Federal Questions Were Raised	12
E. Federal Questions Are Substantial	14
(1) The Decisions of This Court Require Property Tax Apportionment of Transportation Equipment Used and Employed in More Than One State	16
(a) Appellant's freight cars run on fixed routes and schedules must be apportioned	17
(b) Appellant's freight cars not run on fixed routes and schedules but run habitually, regularly, and continuously on lines of other railroads outside of Pennsylvania must be apportioned	17
(2) The Decision of This Court in *New York Central and Hudson River Railroad Co. v. Miller* is contrary to, and is not in accord with, its Property Tax Apportionment Decisions	20

TABLE OF CASES CITED (Continued)

Page

Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S. Ct. 432 (1949) 4, 16, 18, 20

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S. Ct. 876 (1891) 4, 17, 21

Scandinavian Airlines System Inc. v. County of Los Angeles (Cal.) Dist. Ct. of Appeals (2nd App. Dist. Div. 2), 6 West's California Reporter 694, 183 Adv. Cal. App. Reports 69 (1960); Modified by S. Ct. of Cal. (5-29-61) 4, 19

Standard Oil Co. v. Peck, 342 U.S. 382, 72 S. Ct. 309 (1952) 4, 16, 18, 19

Standard Oil Company of California v. Johnson, 316 U.S. 481, 62 S. Ct. 1168 (1942) 3

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S. Ct. 36 (1905) 4, 16, 19, 20

Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 20 S. Ct. 631 (1900) 4, 18

STATUTES AND AUTHORITIES CITED

Act of June 1, 1889, P.L. 420, Sections 20 and 21 (a) as Amended, 72 Purdon's Pennsylvania Statutes §§ 1871, 1901, 1902 ..... 5, 6

Act of June 22, 1931, P.L. 685, § 1, 72 Purdon's Pennsylvania Statutes § 1896 6

Fiscal Code of Pennsylvania, 72 Purdon's Pennsylvania Statutes § 1104 ..... 2, 3

Interstate Commerce Act of 1920, as amended, 49 U.S.C.A., § 1, Pars. 9-14 ..... 10, 14

STATUTES AND AUTHORITIES CITED (Continued)

Page

U.S.C. Vol. 28, §§ 1257 (2) and (3), 2103 3

U.S. Constitution:

Article I, Section 8, Clause 3 .....3, 5, 11, 13, 16, 17, 19

Fourteenth Amendment—Due Process .....
.....3, 5, 11, 13, 16, 17, 18, 19

Fourteenth Amendment—Equal Protection .....
.....3, 5, 12, 13, 22

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Appellant,

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COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Appellant, Central Railroad Company of Pennsylvania, appeals from the *portion* of the final judgment of the Supreme Court of Pennsylvania, affirming the judgment of the court below, which sustained the constitutionality of the

state tax statute as construed and applied in assessing capital stock tax (a property tax) against appellant for the year 1951; and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

The portion of the final judgment of the Supreme Court of Pennsylvania modifying the judgment of the court below required apportionment of diesel locomotives run on fixed routes and regular schedules in and out of Pennsylvania. The portion thereof affirming the judgment of the court below: (1) denied apportionment for freight cars run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of Central Railroad Company of New Jersey (CNJ) in New Jersey; (2) denied apportionment for *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental; and held that the tax settlement did not discriminate against appellant. This appeal relates only to the affirmance.

A. OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 403 Pa. 419, 169 A.(2d) 878 (April 17, 1961), and is printed in Appendix B hereto.

The opinions of the trial court, Common Pleas of Dauphin County, Pennsylvania, entering judgment *nisi* and overruling exceptions, are included at pages 180a-187a, 204a of the printed *Pennsylvania Supreme Court Record* (hereinafter referred to as "R") filed herewith.

B. JURISDICTION

The grounds on which the jurisdiction of this court is invoked are:

(1) This action by appellant, a Pennsylvania Corporation, was brought under the provisions of Section 1104 of the Fiscal Code of Pennsylvania, 72 Pennsylvania Purdon's

Statutes, § 1104, on the ground that the unapportioned capital stock tax (a property tax) assessed on its freight cars, both those run on fixed routes and regular schedules in and out of Pennsylvania and those run regularly, habitually and continuously on the lines of other railroads outside of Pennsylvania, violated the Due Process, the Commerce Clause, and the Equal Protection of the Laws provisions of the Constitution of the United States. A decision on these points was necessary to the determination of the case. The portion of the final judgment and decision of the Supreme Court of Pennsylvania, the highest state court in which a decision in the suit on these points could be had, were in favor of the statute's validity. Accordingly, this Court has jurisdiction upon appeal to review the judgment in question. *Standard Oil Company of California v. Johnson*, 316 U. S. 481; 86 L. Ed. 1611.

(ii) The judgment of the Supreme Court of Pennsylvania, review of which is sought by this appeal, was dated and filed on April 17, 1961, and was made final on May 25, 1961, by refusal by said Court of appellant's petition for reargument (Appendix C and D, pp. 34-54). Notice of Appeal to this Court was filed July 14, 1961 in the Supreme Court of Pennsylvania.

(iii) The statutory provisions conferring jurisdiction of the appeal on the Supreme Court of the United States are to be found in 28 U. S. C. §§ 1257(2) and (3) and 2103.

(iv) The following cases sustain the jurisdiction of the Supreme Court of the United States to review the portion of the judgment on appeal in this case:

Question 1.

(a) Freight Cars—Regular Routes and Schedules

Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 S. Ct. 968 (1940).

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. 876 (1891).

Braniff Airways Inc. v. Nebraska State Board, 347 U. S. 590, 74 S. Ct. 757 (1954).

(b) FREIGHT CARS—REGULAR, HABITUAL AND CONTINUOUS INTERSTATE MOVEMENT AND NON-DOMICILIARY ABSENCE

Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 S. Ct. 968 (1940).

Pullman's Palace Car Co. v. Pennsylvanic, 141 U. S. 18, 11 S. Ct. 876 (1891).

Braniff Airways Inc. v. Nebraska State Board, 347 U. S. 590, 74 S. Ct. 757 (1954).

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36 (1905).

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 S. Ct. 599 (1899).

Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 S. Ct. 631 (1900).

Johnson Oil Refining Co. v. Oklahoma et al., 290 U. S. 158, 54 S. Ct. 152 (1933).

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 69 S. Ct. 432 (1949).

Standard Oil Co. v. Peck, 342 U. S. 382, 72 S. Ct. 309 (1952).

Flying Tiger Lines, Inc. v. County of Los Angeles, (Calif.) 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

Scandinavian Airlines System, Inc. v. County of Los Angeles, Dist. Ct. of Appeals (2nd. App. Dist. Division 2), 6 West's California Reporter 694, 183 Adv. Cal. App. Reports 69 (1960): modified by S. Ct. of California (May 29, 1961).

Oklahoma Tax Commission v. American Refrigerator Transit Co., Sup. Ct. of Okla., 349 P. 2d 746 (12-22-59).

Question 2.

Morey v. Doud, 354 U. S. 457, 77 S. Ct. 1344 (1957).

Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U. S. 96, 19 S. Ct. 609 (1899).

State Statute Involved

(v) The validity of the following Pennsylvania statute, as construed by the Supreme Court of Pennsylvania, is involved: Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended (72 Purdon's Statutes, Sections 1871, 1901, 1902).

C. QUESTIONS PRESENTED

1. Does the *unapportioned* capital stock tax (property tax) levy of Pennsylvania, the domiciliary state, on appellant's freight cars run under an operating agreement on fixed routes and regular schedules over railroad lines to and from the state and on *other* freight cars of appellant run habitually, regularly, and continuously on railroad lines to and from, or wholly outside, the domiciliary state, under a Car Service and Per Diem Agreement, violate the Commerce Clause and the Due Process of the laws provisions of the Federal Constitution?

2. Does the *unapportioned* capital stock tax settlement against appellant violate the equal protection of the laws provisions of the Federal Constitution when apportionment is denied to appellant, having no trackage outside the state, and is allowed to other railroads with tracking in and out of the state, for freight cars while on the lines of using railroads outside of Pennsylvania under a Car Service and Per Diem Agreement?

D. STATEMENT OF THE CASE

(1) The Statute; Nature of Tax; and Tax Formula.

Section 20 of the tax statute (Appendix A) requires Pennsylvania corporations and corporations organized un-

der the laws of any other state and doing business in and liable to taxation within this Commonwealth or having capital employed or used in this Commonwealth to make an annual report to the Department of Revenue on a form prescribed by that Department and to include therein, *inter alia*:

> "Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.
>
> "Sixth. A valuation and appraisal * * * of the capital stock of the said corporation * * * at its actual value in cash as it existed at the close of the year for which the report is made".

Section 21(a) imposes tax at the rate of five mills upon each dollar of the actual value of the whole capital stock of Pennsylvania Corporations as ascertained in the manner prescribed in the twentieth section; and Section 21(b) imposes a franchise tax based upon the capital stock value of foreign corporations (not at issue in the present case).

The nature of the tax is not in dispute. It has conclusively been held, without dissent, to be a tax on property and assets of Pennsylvania Corporations as represented by capital stock value.[1]

The Act of June 22, 1931, P. L. 685 (Appendix A) prescribes the formula to be used to exclude from the tax, exempt assets, such as United States securities and tangible property having a situs outside the state. The amount of such assets is deducted from total assets. The ratio of the remaining assets to total assets is then applied to the whole capital stock value.

In the instant case on appeal, there is involved the issue of exclusion of the following assets which appellant contends

[1] *Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905); *Com. v. Union Shipbuilding Co.*, 271 Pa. 403, 114 A. 257 (1921).

had a situs outside of, or were substantially absent from, the domiciliary state and, therefore, were beyond its taxing power and jurisdiction.

$525,765.71—Average value of freight cars (158) run on fixed routes and regular schedules over the lines of CNJ outside of Penna. (S. F. Par. 14 and Exhibits Y-2 and Y-5, R. 50a, 131a, 134a).

$7,282,523.00—Average value of freight cars (218.23) run regularly, habitually and continuously on the lines of *other* railroads outside of Penna. (S. F. Pars. 13, 15, 16 and Exhibits Y-2, Y-3, Y-4, Y-5 and Z, R. 49a, 50a, 51a, 131a-143a, 145a).

(2) History of the Case.

Appellant, a Pennsylvania Corporation, was incorporated for the purpose of "constructing, maintaining and operating a railroad for public use in conveyance of persons and property" (S. F. Par. 2, R. 38a). All of its capital stock was owned by its parent company, The Central Railroad Company of New Jersey, a New Jersey Corporation, hereinafter referred to as CNJ (S. F. Par. 3, R. 38a).

The railroad operated by appellant extended from the anthracite region in Pennsylvania (Scranton and Wilkes-Barre) to the Pennsylvania-New Jersey border at Easton (Pa.) where it connected with the railroad lines operated by CNJ to Jersey City and points along the north Jersey Coast. Appellant's total mileage (owned and leased—all in Pa.) was 206.74 - 123.47 main line and 83.27 branch (S. F. Par. 4, R. 38a).

There are two separate and distinct types of leasing involved in the instant case, the one under the Operating Agreement between appellant and CNJ and the other under the Car Service and Per Diem Agreement of the Association of American Railroads.

(a) The Operating Agreement

Prior to August 5, 1946, CNJ operated its railroad lines in New Jersey and it operated, *also*, under lease or sub-leases the railroad lines from Penna.-N. J. border at Easton to the anthracite region in Pennsylvania. On August 5, 1946, appellant, with the consent of the Interstate Commerce Commission (ICC), terminated the lease and sub-leases to CNJ of the railroad lines in Pennsylvania and took over their operation and the parties (appellant and CNJ) entered into an operating agreement *in order to continue the existing through freight and passenger service over their respective lines.* This Agreement provided that each party "shall operate such through service" over their respective lines; that "each party shall furnish its fair share of locomotives and other equipment necessary to operate such service"; and that "whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and operated by such other party until returned to the former's lines" (S. F, Exhibit A, R. 58a-65a).

Pursuant to this agreement, appellant's diesel locomotives and freight cars, in the course of *through* freight shipments originating on its lines in Pennsylvania or on the lines of CNJ in New Jersey, were run *on fixed routes and regular schedules* in and out of Pennsylvania over its own lines in Pennsylvania and over the lines of CNJ in New Jersey and, for such use, appellant received a division of freight revenues, a mileage rate for its locomotives and a per diem rental for its freight cars while on the lines of CNJ (S. F, Pars. 14 and 18 and Exhibit A, Sections 2 and 5, R. 50a, 52a, 60a). The mileage ratio of freight locomotives (30 units) was 56.5523% in Pennsylvania and 43.4477% outside of Pennsylvania; and this mileage ratio applied to the average value of appellant's freight locomotives results in an allocation of average value of $1,908,381 or 17 locomotives to Pennsylvania and $1,466,160 or 13 locomotives outside of

Pennsylvania (S/F, Par. 18, Exhibit Z, R. 52a, 145a). This apportionment was allowed in the portion of the judgment of the Supreme Court of Pennsylvania *modifying* the judgment of the Court below.

Appellant owned 3074 freight cars during 1951, having an average net book value of $10,225,769 or an average net book value per car of $3,326.53 (S/F, Par. 16, Exhibits Y-2 and Z, R. 51a, 131a, 145a). Total car days were 3074 times 365 days or 1,122,010 and appellant's freight cars were on the lines of CNJ *under the Operating Agreement* for 57,689 car days (S/F, Exhibits Y-2 and Y-5, R. 131a, 134a). The average number and value of cars thus run on the lines of CNJ are determined by the ratio $\frac{57,689 \times \$10,225,769}{1,122,010} =$ 525,765.71 average value divided by $3,326.53=158 average number. This apportionment was denied by the Supreme Court of Pennsylvania and is at issue in this appeal.

Appellant's office at Mauch Chunk, Pennsylvania was relatively insignificant. Under the said Operating Agreement, appellant maintained joint offices and had joint operating and administrative personnel with CNJ at Jersey City, New Jersey and New York City; there, its nine operating departments were located which conducted its railroad operations in Pennsylvania. (S/F, Pars. 7, 8, 9, 10, 11, Exhibits A, C to W inclusive, R. 40a-49a, R. 58a-65a, R. 67a-129a). It paid its share of unemployment insurance and railroad retirement contributions on wages and salaries of joint employees; and on the wages of its sole employees actually on its railroad lines, it made similar payments (S/F, Pars. 9, 12, R. 45a-48a, R. 49a).

Appellant is not qualified or authorized to do business in any state other than Pennsylvania; nor does it pay franchise or property or other taxes to states other than Pennsylvania except in respect to wages of joint employees referred to. (S/F, Par. 12, R. 49a).

(b) Car Service and Per Diem Agreement

The Interstate Commerce Act of 1920, as amended, 49 U.S.C.A. Section 1, Pars. 9-14, requires, *inter alia*, railroads to interchange freight and passenger cars in order to provide rapid and efficient through interstate movement of freight and passengers as compared with prior practice of transfer from cars of one railroad to the cars of another.

Appellant is a member of the "Association of American Railroads." Under a "Car Service and Per Diem Agreement" entered into by members of the association pursuant to said Act of 1920, the owning railroad is paid a per diem rate of $1.75 (S. F, Exhibit X, R. 130a) for its freight cars while on the lines of other subscribing railroad members and on the lines of non-subscribing railroads (S. F, Par. 13 and Exhibit X, R. 49a, 50a, 130a).

Under this Agreement, it is stipulated by the parties in the instant case that appellant's freight cars, leased to subscribing members, *were regularly, habitually and continuously employed* on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania (S. F, Pars. 13, 15 and Exhibits Y-2, Y-3, Y-4 and Y-5, R. 49a, 50a, 51a, 131a-153a). *This dominant and controlling stipulated fact has been overlooked and disregarded by the courts below (Commonwealth Pleas, Dauphin County and Supreme Court of Pennsylvania).* The car day ratio for the entire year 1951 (total car days 1,122,010) produces the following result:

Car Days	*Percentage*	*Location of Using Railroad*	*Average Value*	*Number of Units*
(1) 104,479	.0931	Appellant—Pa	952,186	286.24
(2) 57,689	.0514	CNJ—Out of Pa	525,768	158.00
(3) 25,321	.0225	Others—All Pa	230,986	69.47
(4) 386,582	.3445	Others—In and Out Pa	3,522,762	1,058.99
(4)(a) 135,455	.120725	In Pa	1,234,475	371.10
(4)(b) 251,077	.2238	Out Pa	2,288,520	687.98
(5) 547,989	.4884	Others—All out Pa	4,994,253	1,501.34
1,122,010	.9999		10,225,083	3,074.04

(1) Regular routes and fixed schedules.

(2) Regular routes and fixed schedules.

(3) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

(4) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

(4) (a) and (b) Breakdown of item (4).

(5) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

At issue, also, in the instant appeal is the denial by the Supreme Court of Pennsylvania of apportionment outside of Pennsylvania of average freight cars of 2189.30 (items 4 (b) and 5, average value $7,282,723) on lines of other railroads outside of Pennsylvania.

Appellant contended that the authorities and particularly those cases cited under Question 1 (a) (ante, pp. 3, 4) were unanimous in holding that an unapportioned property tax by Pennsylvania, the domiciliary state, on appellant's diesel locomotives and freight cars running on regular routes and fixed schedules to and from the domiciliary state violated the Due Process and Commerce Clause provisions of the Federal Constitutions.

It contended further, on the basis of authorities cited under Question 1 (b), (ante, p. 4), that the same provisions of the Federal Constitution were violated by Pennsylvania's unapportioned property tax on appellant's freight cars which ran regularly, habitually and continuously to and from, and outside, the domiciliary state, on the lines of other railroads under a per diem rental agreement.

The Supreme Court of Pennsylvania affirmed appellant's contention in respect to diesel locomotives and overruled the court below. It failed to distinguish between appellant's freight cars run on fixed routes and regular schedules and those that did not, probably because the compensation to appellant in both situations was a per diem rental. It overruled appellant's contentions in both situa-

tions on the ground that "freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and schedules, do not, although an average number may be present in another state, acquire a tax situs outside the domiciliary state" (post, p. 30); and in support thereof, it held that the decisions of the Supreme Court of the United States (cases cited under Question I (a) and (b), ante, pp. 3, 4) requiring apportionment, under similar circumstances, of other types of transportation equipment used in interstate commerce (pullman, refrigerator and tank cars; boats, barges and vessels; and airplanes) are not applicable to, and do not require apportionment of, railroad rolling stock (appellant's freight cars).

In respect to the second question at issue, appellant contended that denial of apportionment to it for its freight cars while on the lines of other railroads outside of Pennsylvania under the Car Service and Per Diem Agreement and the allowance of such apportionment to other owning railroads discriminated against appellant. The Supreme Court of Pennsylvania overruled appellant's contention on the ground that Pennsylvania could make valid classification between appellant whose railroad trackage was wholly in Pennsylvania, and other owning railroads whose trackage extended beyond Pennsylvania's borders.

(3) How the Federal Questions Were Raised.

a. From the beginning of this litigation, appellant has challenged the unapportioned tax on its freight cars run on fixed routed and regular schedules under an Operating Agreement over the lines of CNJ in New Jersey and on its freight cars run regularly, habitually and continuously over the lines of other railroads outside of Pennsylvania under a per diem rental agreement as constituting a violation of the Due Process, Commerce Clause and Equal Protection of the laws provisions of the Federal Constitution. This position of appellant was specifically maintained as follows:

(i) In its Appeal and Specification of Objections filed in the Court of Common Pleas of Dauphin County, Paragraph 3(a), (b), (c)—(R. 6a, 7a).

(ii) In its Requests for Conclusions of Law Nos. 6, 8, 9, 11, 13, 14, 15 filed with the trial court (R. 175a-178a) which were refused (R. 187a).

(iii) In its exceptions Nos. 4, 5, 8, 9, 10, 11, 12, 16, 18-26, 31-34, 36, 38, 39, 40, 44 (R. 190a-196a, 198a-202a) which were *dismissed by the trial court* (R. 204a).

(iv) In its brief before the Supreme Court of Pennsylvania where the questions involved were stated as follows:

> "2. Does the unapportioned capital stock tax settlement on appellant's diesel locomotives and freight cars run on regular routes and fixed schedules over railroad lines outside of Pennsylvania and on other freight cars used habitually, regularly and continuously on railroad lines outside of Pennsylvania under a Per Diem Agreement, violate the Commerce Clause of the Federal Constitution and the due process of the laws provisions of the Federal and State Constitutions?
>
> "3. Does the capital stock tax settlement against appellant violate uniformity of taxation and equal protection of the laws when apportionment is denied to appellant, and is allowed to other railroads whose lines extend beyond the physical borders of the State, for freight cars while on the lines of using railroads outside of Pennsylvania under a Per Diem Agreement?

(v) In its Petition for Reargument filed in the Supreme Court of Pennsylvania, which was denied (post, pp. 36-54).

At each of the above stages of the litigation, the trial court and the Supreme Court of Pennsylvania reached conclusions of law adverse to appellant's contentions. The facts in this case were stipulated by agreement of the parties (R. 38a-158a) but both state courts were guilty of gross negligence in disregarding the dominant, controlling fact as stated in Paragraph 15 thereof (S. F. Par. 15, R. 50a, 51a) to

the effect that appellant's "freight cars were regularly, habitually and or continuously employed on the lines of other railroads operating wholly in Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania."

E. FEDERAL QUESTIONS ARE SUBSTANTIAL.

Appellant's railroad lines lie wholly within the Commonwealth of Pennsylvania but they connect at Easton, Pennsylvania and Phillipsburg, New Jersey, with the railroad lines of Central Railroad Company of New Jersey. Its diesel locomotives and freight cars are run on regular routes and fixed schedules over its own lines in Pennsylvania and over the lines of CNJ in New Jersey in order to furnish through service as provided in an operating agreement between the parties.

Under the Interstate Commerce Act (§ 1, Pars. 4, 10 and 11, 49 U.S.C.A. § 1) common carriers subject to the provisions of the Act are required to interchange facilities and to establish through routes with other such carriers. The members of the Association of American Railroads, which included appellant; agreed under their Car Service and Per Diem Agreement to interchange freight cars at a per diem rental of $1.75. Appellant's entire fleet of 3,074 freight cars was subject to this agreement. It is stipulated by the parties in the instant case (S. F, Par. 15, R. 50a, 51a) that under the latter agreement appellant's freight cars were regularly, habitually, and continuously employed on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania.

On a car hire or car day ratio basis an average of 158 of appellant's freight cars (ante, pp. 10, 11) were run on fixed routes and regular schedules outside of Pennsylvania; and an average of 2,189 of appellant's freight cars (items (4) (b) and (5), ante, pp. 10, 11) were run regularly, habitually, and

continuously on lines of other railroads outside of Pennsylvania.

Pennsylvania, the domiciliary state, imposed an unapportioned property tax (Capital Stock Tax) upon all of appellant's diesel locomotives and freight cars. The Supreme Court of Pennsylvania held that the diesel locomotives had to be apportioned but without distinguishing between freight cars run on fixed routes and regular schedules and freight cars run on the lines of other railroads under the Car Service and Per Diem Agreement, it upheld the unapportioned property tax upon all of appellant's freight cars.

In reaching this conclusion the Supreme Court of Pennsylvania relied upon the decision of this Court in *New York Central and Hudson River Railroad Co. v. Miller*,[2] which appellant contends is contrary to, and conflicts with, the decisions of this court as cited under Question 1 (a) and (b) (ante, pp. 3, 4), which require apportionment of appellant's freight cars under the two situations referred to. In its Opinion the Supreme Court of Pennsylvania said (post, p. 30):

> "* * * Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules do not, although a certain average number may be present in another State, acquire a tax situs outside the domiciliary state."

The Supreme Court of Pennsylvania has refused to extend to railroad rolling stock the decisions of this Court requiring property tax apportionment involving other types of transportation equipment such as tank and refrigerator

[2] 202 U. S. 584, 26 S. Ct. 714 (1906).

cars, pullman palace cars, airplanes, and boats, barges and vessels operating on inland waters.

Thus, the power and jurisdiction of Pennsylvania, the domiciliary state, to levy an unapportioned property tax on railroad rolling stock under the circumstances in the instant case and the exposure of such railroad rolling stock to multiple property taxation by the several states present substantial Federal Questions under the Due Process and Commerce Clauses of the Federal Constitution. These questions in the instant case affect, and are of vital importance to, the entire railroad industry under similar circumstances.

(1) The Decisions of this Court Require Property Tax Apportionment of Units of Transportation Equipment Used and Employed in More Than One State.

In the case of real estate and tangible property physically present in only one State, only the State in which the property is located has power to levy property tax thereon. This Court has developed special rules to establish the power and jurisdiction of a State, either domiciliary or non-domiciliary, to levy a property tax on movable tangible property physically present and used in more than one State. Under these rules this court has held that the tax in practical operation must bear relation to opportunities, benefits or protection conferred or afforded by the taxing state.[3] As illustrative of the basis of these rules this Court said in *Johnson Oil Refining Company v. Oklahoma*[4] at p. 162:

> "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of

[3] *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949).

[4] 290 U. S. 158, 54 S. Ct. 152 (1933).

that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several states—the individual cars *constantly running in and out of each State*—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." (Emphasis added).

Habitual presence and employment are the criteria of the power of a State, either domiciliary or non-domiciliary, to levy a property tax on movable transportation equipment. Fixed routes and regular schedules are more clearly evidence of habitual presence and employment, but the special rules of property tax apportionment are not limited to transportation equipment moving on fixed routes and regular schedules provided there is evidence of habitual presence and employment.

(a) Appellant's freight cars run on fixed routes and schedules must be apportioned.

The decisions of this court are unanimous in requiring property tax apportionment under Due Process and the Commerce Clause where transportation equipment is run on fixed routes and regular schedules to and from the domiciliary state or other states.[5] Therefore, the judgment of the Supreme Court of Pennsylvania on these issues should be reversed.

(b) Appellant's freight cars not run on fixed routes and schedules but run habitually, regularly and contin-

[5] *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 60 S. Ct. 968 (1940); *Pullman's Palace Car Co. v. Pa.* 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

uously on lines of other railroads outside of Pennsylvania must be apportioned.

Seventy-one per cent of the time of all of appellant's freight cars or an average number of 2,189 were run habitually, regularly and continuously on the lines of other railroads outside of Pennsylvania under the Per Diem Rental Agreement. The Record does not disclose the amount of time and the average number of freight cars in each of the non-domiciliary states. However, the names of the using railroads are disclosed in the Record (S/F, Exhibits Y-3, Y-4 and Y-5, R. 132a—143a). As indicated heretofore, there is evidence also in the Record that appellant's freight cars were run habitually, regularly and continuously on lines of using railroads outside of Pennsylvania.

This Court has upheld apportioned property taxation by the non-domiciliary state of refrigerator cars,[6] tank cars,[7] boats, barges and vessels,[8] and airplanes.[9] The basis of the power to tax was habitual presence and employment in the taxing state. An apportionment ratio was used to determine the average units of property which were said to have a "permanent situs" for property tax purposes within the taxing state.

Under the same theory and principle of constitutional law under due process, this Court and others have held that the movement of units of transportation equipment regularly, habitually and continuously to and from the domiciliary state precludes the domiciliary state from levying an unapportioned property tax upon all such units of

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[6] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900).

[7] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

[8] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[9] *Braniff Airways, Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

transportation equipment.[10] This result is reached in order to make the property tax of the domiciliary state bear relation to the opportunities, protections and benefits afforded by its laws. In these cases the domiciliary state is required to use an apportionment formula to determine the average number of units of the transportation equipment which were within its jurisdiction during the tax period. In these cases, also, the owning corporation (the taxpayer) was not required to establish by evidence the average number of units of transportation equipment which had obtained a situs in, and which had been taxed by, a non-domiciliary state.

Under the decisions of this court upholding apportioned property taxation by a non-domiciliary state on an average number of units and under the decisions of this court limiting the power of the domiciliary state to levy an apportioned property tax only upon the average number of units within its jurisdiction during the tax period, the Pennsylvania unapportioned property tax on all of appellant's freight cars operated by using railroads outside of Pennsylvania under the Per Diem Agreement violates the Due Process of the Laws Provisions of the Federal Constitution. Furthermore, the exposure of these freight cars of appellant to multiple property taxation by the several states in which they are employed and used violates the Commerce Clause of the Federal Constitution.[11] Therefore, on these issues the judgment of the Supreme Court of Pennsylvania should be reversed.

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[10] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles* (Cal.), 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001; *Scandinavian Airlines System Inc. v. County of Los Angeles* (2nd App. Dist. Div. 2) 6 West's Cal. Rep. 694, 183 Adv. Cal. App. Reports 69 (1969); Modified by S. Ct. of Cal. (May 29, 1961).

[11] *Standard Oil Company v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

(2) The Decision of this Court in New York Central and Hudson River Railroad Co. v. Miller Is Contrary to, and Is Not In Accord With, Its Property Tax Apportionment Decisions.

This case involved the railroad's claim for apportionment of the New York tax on railroad cars not running on fixed routes and schedules on the lines of the using railroads in and out of New York, the domiciliary state, and on the lines of other railroads outside of that state. This Court's ruling denying apportionment in that case is evidence of its reluctance at that time to extend property tax apportionment to railroad rolling stock. In view of its well established decisions requiring property taxation apportionment of transportation equipment, which we have discussed and referred to, and in view of the particular facts in the instant case, the reasons given by this Court in denying apportionment in the *Miller* case are not applicable for the following reasons:

(a) The fact of "continuity and regularity" of movement to and from, or absence from, the domiciliary state, which was lacking in the *Miller* case is present in the instant case under agreement of the parties.

(b) In the *Miller* case, this Court invoked the property tax rule applicable to vessels operating on the high seas, to wit: That vessels did not acquire "permanent situs" outside of the domiciliary state unless specific units were identified as usable outside throughout the entire tax year. This rule was rejected in its application to boats, barges and vessels operating on inland waters in *Ott v. Mississippi Valley Barge Line Co.*;[12] and had been rejected prior thereto in the property taxation of other types of equipment used in freight transportation on land, such as pullman

[12] 336 U. S. 169, 69 S. Ct. 432 (1949).

and tank cars.[13] Therefore, the home port rule in respect to vessels operating on the high seas is not applicable to railroad rolling stock today.

(c) This court in the *Miller* case did not apply the due process constitutional test of relation between tax and opportunities, benefits and protection afforded by the laws of the taxing state.

The Supreme Court of Pennsylvania has held in the instant case that even if if an average number of units of freight cars were present in another state the rule of the *Miller* case is applicable. This would seem clearly to be in error in view of the decisions of this court requiring property tax apportionment in such a situation.

(3) The Unapportioned Property Tax On Its Freight Cars Discriminates Against Appellant.

It is stipulated by the parties (S F, Par. 25 R. 54a, 55a; and amended S F, R. 159a) that in settling the capital stock tax, a property tax, against other railroads with trackage extending beyond the borders of Pennsylvania, apportionment was allowed for freight cars while on the lines of other railroads outside of Pennsylvania under the Per Diem Agreement. Appellant's contention of discrimination was overruled by the Supreme Court of Pennsylvania on the grounds that it was reasonable for the Pennsylvania Legislature to classify railroads whose trackage lay wholly within the state such as appellant, and railroads having trackage outside of the state, and to deny apportionment to appellant and to allow apportionment to the latter companies.

Since the Supreme Court of Pennsylvania had found that freight cars used pursuant to the Per Diem Agreement had not obtained a tax situs outside of Pennsylvania

[13] *Pullman's Palace Car Co. v. Pa.* 141 U. S. 18 11 S. Ct. 876 (1891); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

(post, p. 33) and that all of the freight cars at full value are taxable at the domicile of the owner, it is submitted that the classification ruling is arbitrary because tax situs cannot be established by classification. Furthermore, it is the intent of the Pennsylvania Tax Statute (post, p. 23) to impose tax on only so much of property and assets as is within the jurisdiction of the state.[14]

Therefore, the classification relied upon by the Supreme Court of Pennsylvania is not based on differences which are reasonably related to the purposes of the Tax Statute;[15] does not impose like burdens and liabilities upon all taxpayers similarly situated;[16] and violates the equal protection of the laws provisions of the Federal Constitution. On this point, therefore, the judgment of the Supreme Court of Pennsylvania should be reversed.

F. CONCLUSION

It is therefore respectfully submitted that this Court has jurisdiction of this appeal; that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution; and that, if the appeal should be considered as improvidently taken, the Court should consider it as a petition for certiorari; and appellant prays that final judgment of the Supreme Court of Pennsylvania be reversed and for such other relief as may be fit and proper.

Roy J. Keefer,
Hull, Leiby and Metzger,
208 Walnut Street,
Harrisburg, Pennsylvania.
Attorney for Appellant.

[14] *Commonwealth v. Delaware, Lackawanna & Western Railroad Co.*, 145 Pa. 96, 22A. 157 (1891).

[15] *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344 (1957).

[16] *Atchison, Topeka and Santa Fe Railroad Co. v. Matthews*, 174 U. S. 96, 104, 19 S. Ct. 609 (1899).

APPENDIX A.

TEXT OF PENNSYLVANIA STATUTES INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, * * *, it shall be the duty of every corporation having capital stock, * * *, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, * * *, now or hereafter incorporated or organized by or under any law of any other State, * * *, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth, * * * to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

* * * * * * *

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and the value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal * * * of the capital stock of said corporation * * * at its actual value in cash as it existed at the close of the year for which the report is made.

Section 21(a) of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21(a). That every domestic corporation * * * from which a report is required under the twentieth section hereof, shall be subject to, * * * a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, * * * as ascertained in the manner prescribed in said twentieth section: * * *.

Section 1 of the Act of June 22, 1931, P. L. 685, 72 Purdon's Pennsylvania Statutes § 1896.

Section 1. Whenever any corporation * * * subject to tax upon its capital stock imposed by and under the laws of this Commonwealth, owns assets which are exempted or relieved from the capital stock tax under the laws of this Commonwealth, the proportion of the capital stock exempted or relieved from the capital stock tax, by reason of the ownership of such assets, shall be the proportion which the value of such assets bears to the value of the total assets owned by such corporation * * *.

APPENDIX B.

COPY OF OPINION AND JUDGMENT BELOW.

(As reported in 403 Pa. 419; 169 A. (2d) 878; headnotes and names of counsel omitted).

Commonwealth v. Central Railroad Company of Pennsylvania, Appellant.

Argued October 3, 1960. Before JONES, C. J., MUSMANNO, JONES, COHEN, BOK and EAGEN, JJ.

Appeal No. 24 May Term, 1960, from judgment of Court of Common Pleas of Dauphin County, No. 274 Commonwealth Docket, 1954, in case of *Commonwealth of Pennsylvania v. Central Railroad Company of Pennsylvania.* Judgment, as modified, affirmed; reargument refused May 25, 1961.

Proceedings on appeal from refusal of review by Board of Finance and Revenue of capital stock tax. Before NEELY, P. J., SOHN and KREIDER, JJ., and RICHARDS, P. J., specially presiding.

Adjudication filed dismissing appeal and finding for plaintiff; defendant's exceptions to adjudication dismissed; and final judgment entered. Defendant appealed.

Opinion by Mr. Justice Cohen, April 17, 1961*:

This is an appeal from the decision of the Court of Common Pleas of Dauphin County sustaining the action of the Board of Finance and Review in refusing appellant's petition for resettlement of its capital stock tax, Act of 1889, P. L. 420, §§ 20, 21, as amended, 72 PS §§ 1871, 1901, 1902, for the year 1951.

Appellant, Central Railroad Company of Pennsylvania, a domestic corporation, operates a railroad, the tracks of

* As modified by letter of the Prothonotary of The Supreme Court of Pennsylvania dated May 16, 1961.

which are solely within Pennsylvania. Appellant interchanges freight cars with connecting carriers as required by the Interstate Commerce Act of 1920, as amended, 49 USCA § 1, pars. 9-14 (1959), thereby promoting the rapid and efficient through movement of freight in contrast to the prior burdensome practice of transferring freight from cars of one railroad to the cars of another. Under the current "car service and per diem agreement" entered into by appellant and all other members of the Association of American Railroads, the owning railroad is paid a per diem rate of $1.75 for its freight cars while on the lines of other railroads.

Appellant also interchanges freight cars and diesel locomotives pursuant to an "operating agreement" with the Central Railroad Company of New Jersey, a New Jersey corporation which has no trackage in Pennsylvania. Appellant and the Central Railroad of New Jersey run regularly scheduled trains between Pennsylvania and New Jersey.

In its capital stock report for 1951, appellant claimed that an average proportionate value of its diesel locomotives and freight cars which were employed on lines of other railroads outside of Pennsylvania were not subject to the capital stock tax. The settlement of appellant's tax did not allow such claim. Resettlement and review of the settlement were refused and an appeal to the Court of Common Pleas of Dauphin County followed.

The case was tried without a jury and most of the facts were contained in a stipulation. Thereafter the case was argued before the court *en banc* which entered a judgment *nisi*. The appellant filed exceptions which, on final judgment, were overruled by the court. This appeal followed.

Appellant maintains that the commerce clause of the Federal Constitution and the due process of the laws provision of the Federal and Pennsylvania Constitutions are violated by the unapportioned capital stock tax imposed

on appellant's diesel locomotives and freight cars. The tax as settled against appellant is similarly attacked as violating uniformity of taxation and equal protection of the laws.

The Pennsylvania Capital Stock Tax is a tax upon the actual value of the capital stock of a domestic corporation as represented by its property and asets: *Commonwealth v. Southern Pennsylvania Bus Company*, 339 Pa. 521, 15 A. 2d 375 (1940). Since the Commonwealth does not have power to tax tangible property located beyond its jurisdiction, so much of the value of the capital stock as is represented by such property is exempt from the tax: *Delaware, Lackawanna and Western Railroad Company v. Pennsylvania*, 198 U. S. 341 (1905). Thus, we must ascertain whether Pennsylvania has jurisdiction to impose an unapportioned tax on all of appellant's rolling stock.

Although the commerce clause has long been considered to be a limitation upon the power of the states to tax an instrumentality of commerce, the law has evolved to a point where the states are not unduly restrained by that doctrine in their efforts to tax instrumentalities of commerce. As the United States Supreme Court recently stated in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590 (1954): "While the question of whether a commodity enroute to market is sufficiently settled in a state for purposes of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process." 347 U. S. at 598, 599. And due process considerations do not necessarily prohibit the domiciliary state from taxing a corporation's personal property which is located outside the state. See *Greenough v. Tax Assessors*, 331 U. S. 486, 491 (1946). Where, however, the particular property has a tax situs outside of the domiciliary

state it would be a violation of due process for the domiciliary state to tax the property at full value since ". . . there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations." *Standard Oil Company v. Peck*, 342 U. S. 382, 384, 385 (1952).

The crucial issue for our determination therefore is whether any of appellant's freight cars and diesel locomotives obtained a tax situs outside this Commonwealth. In order to determine this issue we must review the cases which have considered the question of tax situs in respect to the rolling stock of railroads, vessels of shiplines and, most recently, the flight equipment of airlines.

The continuous and constant use of a portion of a railroad's rolling stock in a non-domiciliary state has been upheld as constituting a tax situs for that portion. In *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18 (1891), Pennsylvania was permitted to impose its capital stock tax on pullman cars traveling on fixed routes and schedules within this jurisdiction. The tax was apportioned on the basis of a mileage traveled or operated ratio. There the court stated that although particular cars may not remain within the state ". . . the Company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property. . . ."

Similarly in *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899), the court sustained a Colorado property tax against an Illinois corporation which leased refrigerator cars to shippers and carriers throughout the nation. The average number of cars "permanently located" within Colorado was held subject to the tax.

In *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149 (1900), the Supreme Court sustained a Utah property tax on an average number of refrigerator cars determined

under facts similar to those in *American Refrigerator Transit Co. v. Hall, supra.*

The Supreme Court first ruled on the power of the domiciliary state to tax the full value of rolling stock in the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905). There Kentucky, the domiciliary state, attempted to levy personal property taxes on the rolling stock (refrigerator cars) of the Union Refrigerator Transit Company. During the years involved, the cars were rented to shippers who took possession of the cars in *Wisconsin* and used them in Canada and Mexico as well as throughout the United States. The court held that Kentucky could not tax the cars since they were "permanently located" in other states.[1]

New York Central Railroad & Hudson River Company v. Miller, 202 U. S. 584 (1906), similarly dealing with the taxing power of the domiciliary state, was decided the next year. There the railroad was a domestic corporation owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing and rating and sending its cars to points without as well as within the state, and over other lines as well as its own. By the familiar course of railroad business a considerable proportion of the taxpayer's cars were constantly out of the state, and upon this ground the taxpayer contended that the proportion should be deducted from its entire capital, in order to find the capital stock employed within the state. In deciding that New York could tax all of the railroad's property at full value the court stated, ". . . [in] the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences re-

[1] Permanent absence of a particular piece of railroad rolling stock has never been a requisite for exemption from taxation by the domiciliary state. See Note 5 in the dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944), for a discussion of this issue.

lied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. . . ." [2] 202 U. S. at 597, 598.

The rules of law to be extracted from the aforementioned railroad cases are, in our opinion, determinative of the issues before this court. Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, although a certain average number may be present in another state, acquire a tax situs outside the domiciliary state.

Both parties to this appeal nevertheless maintain that subsequent Supreme Court decisions have altered the above rules. We do not agree.

In *Johnson Oil Refining Co. v. Oklahoma ex rel Mitchell*, 290 U. S. 158 (1933) the court ruled that Oklahoma could not levy an unapportioned tax upon 100% of the rolling stock of a refining company domiciled in Illinois. The *ratio decidendi* of the case was that the tank cars which made *regular* trips from the taxpayer's Oklahoma refineries to out-of-state purchasers acquired a proportionate tax situs in each state through which it passed on such trips. The *Johnson* case, *supra*, is in accord with the prior tank and refrigerator car cases and does not alter the holding in *New York Central Railroad & Hudson River Company v. Miller*, *supra*,

[2] *See Commonwealth of Kentucky v. Union Pacific Railroad Company*, 214 Ky. 349, 283 S.W. 119 (1926), where the Supreme Court of Kentucky used comparable language when denying that Commonwealth the power to tax a non-domiciliary's freight cars which were running on the lines of a domestic railroad pursuant to an operating agreement. The Kentucky court distinguished the pullman, tank and refrigerator car cases on the issue of substantial profit received by the tank line and like companies for use of their cars when in a foreign state.

in respect to the tax situs of freight cars which are freely and irregularly interchanged by cooperating railroads.

The more recent Supreme Court decisions deal with instrumentalities of commerce other than railroad cars.

In *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949), the Supreme Court departed from the traditional view that a vessel could be taxed only by the state of domicile and upheld the power of Louisiana to tax "an average portion of property of a foreign corporation operating an interstate barge line, permanently within the state." Shortly thereafter in *Standard Oil Co. v. Peck, supra*, the Supreme Court reconsidered the power of the domiciliary state to tax vessels at full value. There the tug boats and barges of an Ohio corporation were used on the Ohio and Mississippi Rivers where they moved regularly to and from Ohio and other points on the two rivers. Only a small part of the transportation was on waters within or bordering Ohio. The court found that, although no one vessel was continuously in another state during the taxable year, the boats and barges "were almost continuously outside of Ohio during the taxable year." The court denied the power of Ohio, the domiciliary state, to levy an unapportioned property tax on all of the boats and barges. It ruled that other states under *Ott v. Mississippi Valley Barge Line Co., supra*, had the power to levy an apportioned tax on the vessels and that the existence of this power, whether exercised or not, precluded property taxation on all of the property by the domiciliary state.

The Supreme Court first considered property taxation of airlines in 1944. In *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944), the Supreme Court sustained a property tax assessed by Minnesota, the domiciliary state, upon the entire value of a fleet of planes which were operated on regular routes and fixed schedules in Minnesota and seven of the Northwestern states. This case, heavily relied upon by the court below and the Commonwealth, must, however, be read in light of two subsequent decisions. In *Standard*

Oil Co. v. Peck, supra, (1952) the court denied the power of the domiciliary state to tax the entire value of the boats and barges which were subject to apportioned property taxes by other states. And, when confronted with the power of a non-domiciliary state to assess a proportional property tax on the flight equipment of an airline, the Supreme Court in *Braniff Airways v. Nebraska Board of Equalization and Assessment, supra*, (1954), all but nullified the ruling in the *Northwest* case.

In *Braniff, supra*, the court sustained an apportioned personal property tax imposed by Nebraska, a non-domiciliary state, on the flight equipment of scheduled airlines. Braniff Airlines, Inc., the taxpayer in that case, made eighteen regular stops a day in Nebraska, rented ground facilities in that state and received one-tenth of its revenue from its Nebraska operations. The *Northwest* case, *supra*, was distinguished in *Braniff* on the ground that in *Northwest* there was no showing that the property had acquired a tax situs in states other than the domiciliary.

Thus, after reviewing the recent Supreme Court rulings, we must reject the contention that these rulings have changed the standards established for the taxation of railroad rolling stock.

Under those standards the diesel locomotives of the Central Railroad Company of Pennsylvania which continuously travel on fixed routes and schedules to and from New Jersey pursuant to the operating agreement with the Central Railroad of New Jersey have obtained a tax situs in New Jersey and thus cannot be taxed for full value by this Commonwealth. Appellant's railroad freight cars (including those which may travel on the lines of the Central Railroad of New Jersey), which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them. Since

the freight cars used pursuant to the car service and per diem agreement of the Association of American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value.

Appellant, in addition, contends that the tax as settled against it violated uniformity of taxation and equal protection of the law. The essence of this argument is that other domestic railroad corporations whose tracks extend beyond this state were subjected to an apportioned capital stock tax settlement (based upon the percentage of total trackage in Pennsylvania) which included a proportion of their freight cars operating on the lines of other railroads outside of Pennsylvania, while appellant receives no exemption on its cars operating without the state on the lines of other railroads. This argument is devoid of merit since the classification was clearly reasonable. See *Commonwealth v. Fireman's Fund Ins. Company*, 369 Pa. 560, 565, 87 A. 2d 255 (1952).

Apportionment of railroad rolling stock based upon track mileage has been held to be a valid taxing standard where the lines of a domiciliary railroad corporation extend beyond the border of that state. See *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362 (1940). Appellant obviously could not qualify for such apportionment since it does not have tracks without the state. The Commonwealth was clearly justified when it included freight cars on the lines of other railroads in the proportionate exemption from the capital stock tax of railroads that had tracks without as well as within Pennsylvania. Under the tracks-mileage apportionment standard and the aforementioned tax situs rules for freight cars, such freight cars acquired a tax situs only in those states in which the tracks of the railroad were situated and this tax situs was based solely on the percentage of trackage in the particular state. That method of taxation is perfectly consistent with our holding in this case.

Judgment as modified is affirmed.

APPENDIX C.

PETITION OF APPELLANT TO COURT TO CONSIDER ITS PETITION FOR REARGUMENT AND ORDER THEREON.

Petition To Consider (Filed May 17, 1961).

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

Central Railroad Company of Pennsylvania, appellant in the above case, by its attorney, Roy J. Keefer, petitions your Honorable Court to consider its Petition for Reargument, being filed concurrently herewith, and to take action thereon either granting reargument or denying the said Petition for Reargument for the following reasons:

1. The Petition for Reargument is being filed within thirty (30) days of the entry of the Court's Opinion and Judgment on April 17, 1961.

2. Appellant desires to take an appeal to the Supreme Court of the United States to review said Opinion and Judgment and to comply with requirements to do so.

3. Rule 11(3) of the Supreme Court of the United States provides:

> "1. An appeal [to review the judgment of a state court of last resort] in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal [within ninety days after the entry of said judgment].

4. Appellant believes that Rule 15(1)(b)(ii) of the Supreme Court of the United States relating in part to the content of the Jurisdictional Statement to be filed with that Court contemplates as a condition precedent to the taking of an appeal to the Supreme Court of the United States by

the appellant in the instant case that a Petition for Reargument shall be filed with, and action on the merits thereof shall be taken by, the Supreme Court of Pennsylvania. This Rule provides:

> "(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, *the date of any order respecting a rehearing*, the date the notice of appeal was filed, and the court in which it was filed." (Emphasis supplied.)

Wherefore, appellant prays your Honorable Court to consider its Petition for Reargument and to take action on the merits thereof.

Respectfully submitted,

ROY J. KEEFER,
Attorney for Appellant.

Order Entered on Petition To Consider.

May 25, 1961, it is hereby ordered that the within petition for reargument be filed with the same effect as if it had been filed within the period prescribed by rule of this court.

PER CURIAM.

APPENDIX D.

PETITION FOR REARGUMENT AND ORDER ENTERED IN SUPREME COURT OF PENNSYLVANIA, No. 24 MAY TERM, 1960.

Petition of Appellant for Reargument (Filed May 17, 1961).

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

The petition of Central Railroad Company of Pennsylvania, appellant in the above case, by its attorney, Roy J. Keefer, respectfully requests your Honorable Court to grant to it a reargument for the reasons set forth below. The judgment of the lower court, *as modified*, was affirmed by this Court on April 17, 1961.

The modification required apportionment of diesel locomotives run on fixed routes and regular schedules in and out of Pennsylvania. The lower court was affirmed: (1) in denying apportionment for freight cars run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of General Railroad Company of New Jersey (CNJ) in New Jersey; (2) in denying apportionment for *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental; and (3) in holding that the tax settlement did not discriminate against appellant. This petition relates only to the affirmance.

Appellant's reasons for Reargument are that the Court erred: (1) in denying apportionment for appellant's freight cars run on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of CNJ in New Jersey; (2) in relying upon the rule in the case of *New York Central Railroad & Hudson River Company*, 202 U. S. 584, in denying apportionment of *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per

diem rental agreement; (3) in holding that decisions of the Supreme Court of the United States involving other types of equipment used in interstate transportation were not applicable to, and did not require apportionment of, appellant's *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental agreement; and (4) in holding that the capital stock tax settlement did not discriminate against appellant.

I. Appellant's freight cars run on fixed routes and regular schedules in and out of Pennsylvania must be apportioned for property tax purposes.

Appellant's diesel locomotives and *some* of its freight cars were run on fixed routes and regular schedules over the lines of appellant in Pennsylvania and over the lines of CNJ in New Jersey under the *same* Operating Agreement between the parties (Stipulation of Facts, par. 14, R. 50a; and Exhibit A attached thereto, R. 58a-65a). The only difference between locomotives and freight cars is the basis of compensation to appellant while on the lines of CNJ in New Jersey: for locomotives, a mileage rate; and, for freight cars, a per diem rental. Insofar as appellant's freight cars were run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of CNJ in New Jersey, they were used under the Operating Agreement *and not* under the Car Service and Per Diem Agreement. The compensation to appellant was rental at the same rate as provided under the latter agreement.

This Court has held that the diesel locomotives so used must be apportioned. Appellant submits that the same facts, circumstances and legal prinieples require apportionment of its freight cars similarly used.

The parties have agreed and stipulated that appellant owned 3,074 freight cars, having an aggregate average net book value of $10,225,769, or an average net book value per car of $3,326.52 (S. F, par. 16, Exhibits Y-2 and Z, R. 51a,

131a, 145a); that appellant's freight cars run on fixed routes and regular schedules were on the lines of CNJ 57,689 car days out of total car days of 1,122,010 (S/F, par. 14, Exhibits Y-2 and Y-5, R. 50a, 131a, 134a).

On the basis of these stipulations, the apportionment of the average value and average number of appellant's freight cars to the lines of CNJ outside of Pennsylvania for 1951 is determined as follows:

$$\frac{57{,}689 \times \$10{,}225{,}769}{1{,}122{,}010} = \$525{,}765.71 \text{ average value}$$

divided by \$3,326.53 = 158 average number.

See page 11 of appellant's brief.

Therefore, appellant submits that an average of 158 freight cars having an average net book value of \$525,765.71 must be apportioned outside of Pennsylvania for 1951 for capital stock tax purposes; and that this Court erred in not so holding.

II. The Court erred in relying upon the rule in New York Central Railroad & Hudson River Company, 202 U. S. 584, in denying apportionment of other freight cars of appellant while on the lines of other railroads outside of Pennsylvania under the Car Service and Per Diem Agreement.

Three principal reasons support this proposition:

First, this Court, in the *Miller* case, relied principally upon the property tax rule applicable to vessels operating on the high seas, to wit, that "the state of origin remained the situs of the property, notwithstanding its occasional excursions to foreign ports", citing *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409 (1906). This meant that the property was taxable by the domicile unless the property had acquired a situs elsewhere by remaining beyond the domi-

cile's borders for the *whole* tax period. This rule was rejected in its application to boats, barges and vessels operating on *inland* waters;[1] and had been rejected prior thereto in the property taxation of other types of equipment used in interstate transportation on land, such as Pullman and tank cars.[2] Therefore, the rule was not applicable to railroad equipment.

Second, this Court, in the *Miller* case, distinguished the *Pullman* case on the ground that the average unit property taxation apportionment rule in that case was based upon an average number of the *same* cars and not upon an average number of *constantly changing* cars; but, since the *Miller* case, the rule has been recognized as applicable or extended to an average number of constantly changing cars or units of equipment receiving protection under the laws of the taxing state.[3] Had the extended rule been recognized at that time, the result in *Miller* might have been different, and, therefore, the *Miller* decision is not controlling in the instant case.

Third, the fact of "continuity and regularity" of movement to and from the domiciliary state which was absent or lacking in the *Miller* case is present in the instant case. Here, the parties have stipulated and agreed that, under the Car Service and Per Diem Agreement, appellant's "freight cars were *regularly, habitually* and/or *continuously* employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and

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[1] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

[2] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

[3] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, (Okla.), 349 P. 2d 746 (1959).

without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania" (S/F, par. 15, R. 50, 51a). It is this fact of regular, habitual and continuous movement of transportation equipment to and from the domiciliary state or the taxing state which establishes, and requires the use by the domiciliary or other state of, the average unit property taxation rule of apportionment regardless of whether the average units of transportation equipment are run on fixed routes and regular schedules[4] or not[5]. See also dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines Inc. v. Minnesota*, 322 U. S. 292 (1944), pp. 321-325 and note 5 at pp. 324 and 325.

The existence of the fact of regular, habitual and continuous movement to and from the domiciliary state establishes *absence* from the opportunities, protection and benefits afforded by the laws of the domiciliary state, *thereby precluding* the domiciliary state from imposing a property tax upon the full value of the transportation equipment—*Union Refrigerator Transit Co. v. Kentucky*, *Peck* and *Flying Tiger* cases.

Therefore, it is submitted, on the basis of these three reasons, that the rule of the *Miller* case is not controlling in the instant case.

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[4] *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 76 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[5] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 U. S. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, (Cal.), 333 P. 2d 323 (1958) cert. den. 359 U. S. 1001; *Oklahoma Tax Commission v. American Refrigerator Transit Co.* (Okla.), 346 P. 2d 746 (December 22, 1959).

III. The Court erred in holding that decisions of the Supreme Court of the United States involving other types of equipment used in interstate transportation were not applicable to, and did not require, apportionment of appellant's other freight cars while on the lines of other railroads outside of Pennsylvania under a per diem rental agreement.

There is involved here the highly important issue whether there is a limitation on the constitutional power of the domiciliary state under due process and the Commerce Clause to levy an *unapportioned* property tax on appellant's freight cars operated under the Car Service and Per Diem Agreement.

In order to prove appellant's proposition stated above, we beg the Court's indulgence to summarize the applicable facts, to discuss the principles established in the decisions and to apply them to the facts in the instant case. These will establish the Court's error.

(a) The Facts.

Appellant's fleet of freight cars numbered 3,074 which developed total car days of 1,122,010 (S. F. par. 15 and Exhibits Y-2-Y-5, R. 50a, R. 131a-R. 143a).

The parties have stipulated as a fact of Record (S. F. par. 15, R. 50a) as follows:

> "Under the said Car Service and Per Diem Agreement, defendant's freight cars were *regularly, habitually and or continuously* employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania." (Emphasis supplied)

From Exhibits Y-2 to Y-6, inclusive (R. 131a-R. 144a), the following is developed:

Total Car Days		1,122,010
Fixed Routes and Regular Schedules (Operating Agreement):		
Appellant's road in Pennsylvania (Y-2)	104,479	
Road of CNJ in New Jersey (Y-5)	57,689	
Car Days	162,168	162,168

Average cars: $\frac{162,168}{1,122,010} \times 3,074 \text{ cars} = 444.29$

Total Car Days—Car Service and Per Diem Agreement		959,842
Regular, habitual and continuous employment on lines of other railroads:		

	Percentage	*Car Days*	
In Pennsylvania (Y-3, Y-4)	16.75%	160,776	
Out of Pennsylvania (Y-4, Y-5)	83.25%	799,066	
			959,842

Total Freight Cars—Car Service and Per Diem Agreement: 3,074 minus 444.29 = 2,629.71

	Percentage	*Average Cars*
Average cars—Pennsylvania $\frac{160,776}{959,842} \times 2,629.71 =$	16.75	440.48
Average cars—out of Pennsylvania $\frac{799,066}{959,842} \times 2,629.71 =$	83.25	2,189.23

For determination of the average number of appellant's freight cars on the lines of specific railroads outside of Pennsylvania, where the car days on an individual road exceed 4,000, see pages 39, 40 and 41 of appellant's brief.

(b) Discussion of Cases.

The fundamental principle that taxation and protection are correlatives has been adopted as the current due process constitutional test of a state's power to tax movable tangible property—that is, physical presence within the taxing state and the *extent* to which protection, opportunities and benefits are afforded to such property by the taxing state,[6] and this test is particularly applicable to transportation equipment used in interstate commerce. Concerning this test, the Court, in the *Ott* case said, at page 25:

> "* * * So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state."

The basic fact of *continuous, habitual* and *regular* movement of transportation equipment to and from the state of domicile, from and to other states, supports the taxing power of the foreign state to levy an *apportioned* property tax[7] and denies the taxing power of the domiciliary state to levy an unapportioned property tax.[8]

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[6] *Standard Oil Co. v. Peck*, 342 U. S. 382, 385, 72 S. Ct. 309 (1952); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36 (1905); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 61 S. Ct. 246 (1940); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949).

[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Oklahoma Tax Commission v. American Refrigerator Transit Co.* (Okla.), 349 P. 2d 746 (1959); *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's Cal. Reporter 694, 183 Advance California Appellate Reports 69 (1960).

[8] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

This basic fact is a stipulated fact of Record in the instant case (S. F, par. 15, R. 50a).

The existence of this basic fact gives to the foreign state the constitutional power under due process to determine the "permanent situs" of *an average number of units* (average unit rule) within the state by some reasonable apportionment ratio (time, miles, stops, business volume, car days, etc.) and to levy a property tax thereon (cases cited in note 7). The rationale of these cases establishing this principle and rule is well-stated in the *Johnson Oil Refining Co.* case (note 7) at page 162 as follows:

> "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several states—the individual cars *constantly running in and out of each State*—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." (Emphasis supplied)

The existence of the basic fact of continuous, habitual and regular movement of transportation equipment to and from the state of domicile denies to the domiciliary state the constitutional power under due process to levy a property tax upon the *full value* of *all units of transportation equipment so used* because in such case the tax would bear no relation to "opportunities, benefits or protection conferred or afforded by the taxing state" (absence from the domiciliary state)[9] and would violate the Commerce Clause

[9] See case cited in note 8.

because the tax on the full value imposed by the domicilary state duplicates an apportioned property tax which foreign states have power to impose (whether exercised or not) upon the same equipment so used within their jurisdiction.[10]

The case of *Union Refrigerator Transit Co. v. Kentucky, supra,* establishes beyond any doubt that the limitation on the constitutional power of the domicilary state is based upon "continuous, regular and habitual" *absence* from the domiciliary state and it established beyond any doubt that an average number of units have obtained a "permanent situs" outside the domiciliary state without requiring proof that an average number of units have obtained such situs in a specific foreign state and that such foreign state has exercised its constitutional power to levy an apportioned property tax thereon. Mr. Chief Justice Stone in note 5 to his dissenting opinion in the *Northwest Airline* case explains the *Union Refrigerator* case at pages 324, 325:

> "'[5] In *Union Transit Co. v. Kentucky,* 199 U. S. 194, it appeared that the cars of the Transit Company, the taxpayer, moved in and out of Kentucky, the state of domicile. The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number "permanently located" outside it only by proof of gross earnings within and without the state. In holding that the state of domicile could not tax tangible personal property "permanently located in other states" (p. 201), it is clear that the Court was limiting the taxing power of the state of domicile to the extent that the cars moving between Kentucky and other states had, under the rule of apportionment, gained a tax situs outside the state because they were "located and employed" there (p. 211). This is evident

[10] *Standard Oil Co. v. Peck,* 342 U. S. 382, 72 S. Ct. 309 (1952). Dissenting Opinion of Mr. Chief Justice Stone in *Northwest Airlines Inc. v. Minnesota,* 322 U. S. 292, 64 S. Ct. 950 (1944), pages 310, 312-317, 325.

from its citation (p. 206) of *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, and *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, as cases involving property "permanently located" in the taxing states. Both cases involved rolling stock continuously moving into and out of the taxing state and sustained taxes upon a proportion of the carrier's total rolling stock based respectively upon the track mileage or upon the average number of cars used within the taxing state. Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state (pp. 202, 211.)' "

The undisputed ratio decidendi of the cases in note 8 is stated in *Scandinavian Airlines Systems Inc. v. County of Los Angeles* (1960)[11] at pages 701-702 as follows:

"The rationale of these cases *is not based on the necessity to avoid double taxation* but, rather on the recognition of the non-domiciliary state's right to fair compensation for the protection and benefits afforded the taxpayer. The power to tax flows from *presence* of the property in the taxing state and the concomitant privileges enjoyed by the owners while thus employed within the jurisdiction. It is the 'unfairness' of the original 'domicile' or 'permanent presence' doctrines as applied to transient carriers which prompted the present rule of apportionment. Surely, the older rules insured that no double tax would result, for only one jurisdiction could tax. Just as surely, the apportionment theory leads to the distinct possibility of double taxation through the utilization of different formulae. Thus, the *onus* of double taxation *falls* not on the jurisdiction levying a fairly apportioned tax but *upon the domiciliary jurisdic-*

[11] 6 West's California Reporter 694, 183 Advance California Appellate Reports 69 (1960).

tion which refuses to apportion its taxes on the basis of benefits and protections actually conferred". (Emphasis supplied.)

Thus, the basic fact of "regular, habitual and continuous" movement of transportation equipment to and from the domiciliary state, from and to other states, whether running on fixed routes and regular schedules[12] or not" gives to the foreign state the constitutional power under due process to determine the average number of units having a "permanent situs" within its borders on some reasonable basis of apportionment and to levy a property tax thereon; and the existence of the same basic fact requires the domiciliary state to determine the average number of units having a "permanent situs" beyond its borders by some reasonable basis of apportionment and limits its constitutional power under due process to levy a property tax upon only the average number of units within its jurisdiction.[14] In this latter situation, the taxpayer does not have the burden and is not required to prove the average number of units in other specific states.[15]

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[12] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's Cal. Reporter 694, 183 Advance Cal. Appellate Reports 69 (1960).

[13] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952). *Flying Tiger Lines Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001; *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, (Okla.), 349 P. 2d 746 (1959).

[14] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

[15] Cases cited note 14.

(c) THE ERRORS OF THE COURT.

In rejecting appellant's claim for apportionment of its freight cars while on the lines of other railroads outside of Pennsylvania and in upholding the unapportioned property tax levied by Pennsylvania, the domiciliary state, upon the full value thereof, this Court said, at page 6 of its opinion:

> "* * * Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, although a certain average number may be present in another state, acquire a tax situs outside the domiciliary state."

and, at pages 9 and 10 of its opinion:

> "Thus, after reviewing the recent Supreme Court rulings, we must reject the contention that these rulings have changed the standards established for the taxation of railroad rolling stock.
>
> "Under those standards the diesel locomotives of the Central Railroad Company of Pennsylvania which continuously travel on fixed routes and schedules to and from New Jersey pursuant to the operating agreement with the Central Railroad of New Jersey have obtained a tax situs in New Jersey and thus cannot be taxed for full value by this Commonwealth. Appellant's railroad freight cars (including those which may travel on the lines of the Central Railroad of New Jersey), which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them. Since the freight cars used pursuant to car service and per diem agreement of the Association of American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in * * *."

In so holding, this Court committed four fundamental errors:

1. It ignored and disregarded the stipulated fact of Record in the instant case (S/F, par. 15, R. 50a) that appellant's freight cars run *regularly, habitually* and *continuously* on the lines of other railroads in, in and out of, and wholly outside of, Pennsylvania.

(i) This compounds the same error committed by the Commonwealth in its brief and by the court below in its opinion and judgment.

(ii) A fortiorari, there is regularity, habituality and continuity of movement where fixed routes and regular schedules are involved *but such movement exists also in the absence of fixed routes and regular schedules* as in the case of tank cars, boats, barges, vessels and airplanes involved in the cases cited in note 13. There is no difference between these cases and the instant case. This distinguishes the case of *Commonwealth of Kentucky v. Union Pacific Railroad*, 214 Ky. 349, 283 S. W. 119 (1926) where "regularity, habituality and continuity" was not a fact of Record, but the court described the journey in Kentucky of the freight cars there involved as "not in the course of travel upon fixed routes but random excursions of casually chosen cars". That case, like the *Miller* case, relied upon by the Court in the instant case, is not applicable or controlling. The logic of the criticism of that case by the author of an Annotation in 49 A.L.R., 1103, is unanswerable. See also appellant's brief, pages 46 and 47.

(iii) The stipulated fact distinguishes the instant case from the *Miller* case (242 U. S. 202), or, speaking bluntly, the rule in that case is not controlling.

2. The second error is the holding that, even though an average number of appellant's freight cars may be present in another state, they do not acquire a tax situs outside the domiciliary state.

(i) The presence of an average number of appellant's freight cars in another state (and this is the actual situation in the instant case, as shown by summary of the facts above) arises from the fact of regular, habitual and continuous movement and gives the foreign state constitutional power under due process to determine that an average number of units has a "permanent situs" within its borders and to levy an apportioned property tax thereon. This is the very essence of the average unit rule, and, therefore, the holding by this Court referred to is contrary to the decisions cited in note 7. Thus, an average number of appellant's freight cars has obtained a tax situs outside the domiciliary state of Pennsylvania.

(ii) The *existence* of the constitutional power of the foreign or other state to levy an apportioned property tax on appellant's freight cars, *whether exercised or not* (not exercised in the instant case), precludes Pennsylvania, the domiciliary state, from levying an unapportioned property tax upon *all* of appellant's freight cars used on the lines of other railroads (2629.71); and, for this Court to hold otherwise, flies directly in the teeth of a specific ruling to that effect in the case of *Standard Oil Co. v. Peck, supra.*

(iii) The cases cited in notes 7 and 13 are applicable and support the above conclusions and, therefore, this Court was in error in holding that they are not applicable and are not controlling.

3. The third error of this Court is that its ruling upholding the unapportioned property tax by Pennsylvania upon the *full* value of *all* of appellant's freight cars used on the lines of other railroads violates the limitation under due process on the constitutional power of the domiciliary state, which requires relationship between the tax imposed and opportunities, benefits and protection afforded by its laws in the operation of the freight cars.

(i) The facts of Record establish that 2629.71 of appellant's freight cars used on the lines of other railroads were

used regularly, habitually and continuously outside of Pennsylvania 83.25% of the time during the year 1951, and that, under these facts, it must be determined on a car-day ratio basis (see computation under summary of facts above) that an average number of 2189.23 of appellant's freight cars had a "permanent situs" outside of Pennsylvania and were beyond the power of Pennsylvania, the domiciliary state, to levy a property tax thereon. Under the same facts, only an average number of 440.48 of appellant's freight cars were subject to the Pennsylvania tax.

(ii) The cases cited in note 14 are applicable and fully support these conclusions; and, therefore, this Court was in error in holding that they are not applicable and are not controlling.

4. The fourth error of this Court is that it ruling upholding the unapportioned property tax by Pennsylvania upon the full value of all of appellant's freight cars used on the lines of other railroads when other states have the constitutional power to levy an apportioned property tax upon the average number of freight cars within their jurisdiction constitutes multiple property taxation of instruments of interstate commerce in violation of the Commerce Clause of the Federal Constitution. The cases cited in note 10 fully support this conclusion.

Appellant respectfully submits that it has established the errors of this Court, which is the subject of this section of the Petition for Reargument.

IV. The Court erred in holding that the tax settlement did not discriminate against appellant.

The appellant contended that the denial of apportionment to it for its freight cars while on the lines of other railroads outside of Pennsylvania under a per diem rental discriminated against it because apportionment was allowed by the tax authorities for the year 1951 for freight cars under

similar circumstances to railroads incorporated in Pennsylvania with trackage within and without Pennsylvania. In such case, the apportionment consisted of ratio of track miles outside of Pennsylvania to total track miles applied to rolling stock, including freight cars on the lines of other railroads under a per diem rental agreement.

This Court overruled appellant's contention on the ground that classification between railroads not having trackage outside of Pennsylvania and railroads having trackage in and out of Pennsylvania, thereby denying apportionment to the former and allowing apportionment to the latter, is reasonable.

Appellant respectfully submits that this ruling of the Court constitutes disdain for reality and is without foundation.

In denying appellant's claim for apportionment of freight cars, grounded on due process, the Court said, at pages 9 and 10 of its opinion:

> "Since the freight cars used pursuant to car service and per diem agreement of the Association of American Railroads *have not attained a tax situs outside of Pennsylvania* it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value." (Emphasis supplied.)

This ruling can only mean that the freight cars so used did not obtain a tax situs outside of Pennsylvania by such use, and are taxable only by the domiciliary state.

Appellant respectfully submits that, if such use does not give rise to tax situs outside of Pennsylvania under due process, tax situs outside of Pennsylvania *cannot be established by classification*. The freight cars so used either have, or do not have, a tax situs outside of Pennsylvania. Whether the owning railroad does or does not have trackage outside of Pennsylvania makes no difference in respect to freight cars of the owner used on the *lines of other* railroads outside of Pennsylvania. In either situation, the railroad owner must be treated the same. It is the denial of apportionment to appellant that creates the discrimination. See note 5 to Mr.

Justice Stone's dissenting opinion in the *Northwest Airlines* case (322 U. S. 294) which contains an analysis of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905) where it is said, at page 325:

> "Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state."

The inference here is that, if the tax of the domiciliary state on tank cars running regularly and continuously to and from the domiciliary state were not apportioned, the owner of the tank cars would be discriminated against by the apportioned tax on railroads with trackage extending beyond the domiciliary state.

In the case of railroads having lines in and out of Pennsylvania, the trackage ratio apportionment has never been applied to rolling stock having a domiciliary situs and not used over the trackage owned; and there is no authority holding that the trackage ratio must be applied in such a case.

Actually, since the lower court opinion in the instant case, the Pennsylvania tax authorities, in making tax settlements against railroads having trackage in and out of the state, have denied apportionment for their freight cars while on the lines of other railroads outside of Pennsylvania. Counsel for appellant has personal knowledge of this fact.

This practice is a recognition of the error of the Commonwealth's and this Court's position in the instant case, and is further a recognition that the "red herring" of classification cannot cure the discrimination against appellant in the instant case.

Appellant respectfully submits, therefore, that the unapportioned tax on its freight cars is invalid on the ground of discrimination.

V. Conclusion

For the reasons stated above, it is respectfully requested that this Court grant reargument to appellant in the instant case in respect to that portion of its Opinion affirming the judgment of the court below. Attached hereto is a copy of the Court's opinion filed in this case on April 17, 1961.

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
Attorneys for Appellant

Order Entered on Petition for Reargument.

May 25, 1961, petition for reargument denied.

PER CURIAM.